

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO**

ERNESTO AVALOS,

Petitioner,

v.

Civ. No. 22-915 RB/GJF

UNITED STATES OF AMERICA,

Respondent.

ORDER TO CURE DEFICIENCY

THIS MATTER is before the Court on Petitioner Ernesto Avalos's Motion to Correct Illegal Sentence Pursuant to F.R. Crim. P. 35(b), filed November 29, 2022. ECF 1 (the "Motion"). In the Motion, Avalos challenges the legality of his sentence in Case No. 20-cr-277-RB-GJF-1. While Avalos seeks relief under Fed. R. Crim. P. 35, the relief he seeks must be raised in a 28 U.S.C. § 2255 habeas petition. *See Bradshaw v. Story*, 86 F.3d 164, 166 (10th Cir. 1996). Avalos is warned that if he pursues relief now, "any subsequent § 2255 motion will be subject to the restrictions on 'second or successive'" habeas claims. *Castro v. United States*, 540 U.S. 375, 376 (2003). Further, Avalos is advised of the one-year period of limitation applicable to § 2255 motions, which runs from the latest of:


- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C.A. § 2255(f). The judgment in the criminal case was entered on November 19, 2020, so if Avalos pursues habeas relief, he will be required to show cause why the motion is not time barred. *See* Cr. Doc. 36.

IT IS THEREFORE ORDERED that, if Avalos seeks relief from his federal sentence, he must file an amended § 2255 petition on the proper form within thirty (30) days of entry of this Order. The failure to timely comply this directive will result in dismissal of this case.

IT IS FURTHER ORDERED that the Clerk's Office shall **MAIL** Avalos a form § 2255 petition.

SO ORDERED.



THE HONORABLE GREGORY J. FOURATT
UNITED STATES MAGISTRATE JUDGE